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Judicial Independence in Family Courts

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I. Introduction

Judicial independence has become an increasingly important area of concern forcourt reformers, academics, the bench, and the bar.[1] Professional associations, such as the American Bar Association and the American Judicature Society, have begun initiatives to focus on the issue, as have citizens groups.[2] Several law journals have published symposia on the topic, as well.[3]

Court reform initiatives are an integral part of judicial independence in the family court context, and, in fact, they have the potential to facilitate an autonomous family court judiciary. Professor Barbara Babb has written extensively on family court reform.[4] She posits that some statewide family court reform projects, notably one that recently was implemented in Maryland, have supported improved judicial selection processes. This process now includes a focus on the candidate's background in and temperament for handling family law matters. Arguably, judges who are familiar with and interested in family law will be less subject to the political and social forces that influence family law decision-making.

The independence of the family court judiciary is influenced by multiple factors, which encompass some of society's most deeply held beliefs.[5] These include issues such as the age at which minors should be subject to criminal responsibility and punishment, the grounds for marital dissolution, gender-related issues in child custody awards, and child rearing standards that define child abuse and neglect. In addition to these philosophical and moral judgments, family law decision-making also is influenced by the method of judicial

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1 *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

2 *See id.*, at 47.

3 *See id.* (noting those journals as publications associated with the following law schools: Georgia State University, Mercer University, St. John's University and the University of Southern California).

4 *See generally* Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998) (advocating the adoption of a therapeutic jurisprudence and holistic perspective for family court reform, which provides an interdisciplinary approach to family law decision-making).

5 See Steven H. Hobbs, *In Search of Family Value: Constructing A Blueprint for Jurisprudential Discourse*, 75 MARQ. L.

selection, the scope of a particular family court's subject matter jurisdiction, community norms and concerns, the expectations of society for judicial decision-making, and the manner in which judges conduct their personal lives.

Most discourses on judicial independence focus on judicial elections and the adverse consequences of selecting judicial officers via this method. The presumption is that when a judge is appointed, she will be freer to make decisions notwithstanding political forces. This assumption, however, may not be particularly relevant in the family court context. In this context, the decisions made are affected not only by external forces, such as community norms and political issues, but by internal factors resulting from a judge's personal experience in her own family. Each judge, after all, is herself the product of a family, and, presumably, she relates to many of the issues that bring families to court. Personal biases borne out of particular circumstances are bound to impact a judge's thinking.

Even if these internal forces are managed, the appointment process as opposed to the election process in and of itself does not support judicial independence. Consider the family court judge appointed by a state or local government official who has an interest in lowering the juvenile crime rate. When faced with a delinquency case, that judge is likely to be influenced by the person to whom she "owes" her seat on the bench. Overall, the most important factor regarding judicial independence in the family court context, however, may be that we do not want judges to have so much discretion in family law matters. As a result of our ambivalence, we tether their decisions to statutes, which circumscribe their roles.[6]

This paper will discuss the particular factors that influence judicial independence in the family court context. First, the paper addresses procedural mechanisms by which an individual becomes a judge. Second, family court jurisdiction and its relationship to the issue of judicial autonomy are addressed. Third, the paper discusses the impact of social norms and political forces on particular aspects of family law decision-making. Finally, the effect of the media, the expectations the public has for judges, and legislative influences on judicial discretion are noted.

[6] *See* John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 FAM. L. Q. 565 (1999) (noting the trend towards legislative control over family law decision-making).

II. Factors Influencing Judicial Independence in the Family Court Context

Method of Judicial Selection

The way in which an individual becomes a family court judge varies from state to state. In Maryland, for example, judges are appointed by the governor for a one-year term and then are subject to a "retention election"[7] for the remaining fourteen-year term of office. Judges who survive the election process are then selected by the administrative judge in each Circuit Court to sit in that court's Family Division for an eighteen-month period. In contrast, New York City's Family Court judges are appointed by the mayor. As John Sampson has noted, "We now have in this country a patchwork quilt of judicial selection methods."[8] The most popular selection method appears to be the electoral process.[9]

Although reformers criticize the election of judges in so far as it has the potential to erode judicial independence, appointing family court judges does not guarantee an independent judiciary. Family court judges are not immune to outside influences, as they are susceptible to political pressures brought to bear by the elected officials who make decisions about the composition of the family court bench. As stated above, in New York City the mayor determines the make-up of the Family Court judiciary. A recent analysis of Family Court judicial appointments by former Mayor Giuliani has highlighted the extent to which his Family Court appointments have reflected his crime control agenda. Daniel Wise states in a recent New York Law Journal article that "[s]omewhat more consistently than his predecessors, practitioners said, Mr. Giuliani has appointed lawyers who spent a large part of their careers as prosecutors, either of criminal cases against adults or juvenile delinquency cases in Family Court."[10]

Family Court Jurisdiction

The breadth of a family court's jurisdiction varies from state to state. In some states[11] family courts have the authority to decide all matters relating to family law.[12] In others, family court subject matter juris-

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[7] *See id.* at 584.

[8] *See id.*

[9] *See id.* (noting that about forty-two states utilize this process).

[10] See Daniel Wise, *Lawyers Find Smart, Committed Judges in Court Defined by Tension*, N.Y.L.J. March 19, 2002 at 1.

[11] *See* Babb, *supra* note 4, at 471 [citing DEL. CODE ANN. tit. 10 §§ 921-928 (Supp. 1996); D.C. CODE ANN. § 11-1101 (1995), §§ 16-2301 to 16-2365 (1997); HAW. REV. STAT. §§ 571-11 to 571-14 (1993)].

[12] *See id.* (Defining family law as cases involving divorce, annulment and property distribution; child custody and visitation; alimony and child support; paternity, adoption, and termination of parental rights; juvenile delinquency, child abuse and child neglect; domestic violence; criminal non-support; name change; guardianship of minors and disabled persons; and withholding or withdrawal of life-sustaining medical procedures, involuntary admissions and emergency evaluations).

diction is limited to deciding matters relating to child protection and dependency, juvenile delinquency, child custody and visitation.[13] Conceivably, the scope of a family court's jurisdiction affects the degree to which a judge is influenced by the community at large and by discrete political constituencies, as well as the extent to which the public has confidence in family court decisions or outcomes.

Family courts whose primary jurisdictional mandates are juvenile causes attract attention from communities focused on crime control and prevention. Consequently, judges may be influenced by anti-crime initiatives that cause them to detain delinquent youth, rather than sentence them to probation and community-based rehabilitation programs. Conversely, family courts with more expansive jurisdiction may be scrutinized on many levels, including issues of divorce, child custody, and family violence. One legal scholar opines that the more comprehensive the jurisdiction of the family court, the greater the public interest.[14]

A family court with comprehensive jurisdiction, however, may support an independent thinking judiciary and promote consumer confidence in the court system. In her discussion of unified family courts, Professor Babb suggests that one of the values of the unified family court model is that it supports informed judicial decisions by making available to judges support staff with backgrounds in mental health and social work.[15] These individuals assist the judge by assessing families, thereby helping to ensure that the court issues decisions that are appropriate for the family's particular circumstances. Arguably, the result may be an increased public trust in the judges who decide family law cases, which, in turn, promotes their independence.

Community Norms/Political Forces

Community norms and political forces influence nearly every area of family law. The more notable influences on particular family law case categories are discussed below.

Child Protection

Judicial decision-making in child protection matters clearly is influenced by public policy. Laws reflective of how best to safeguard the welfare of children, while protecting the integrity of the family, guide family court judges to decide the critical issue of where to place a

[13] N.Y. Fam. Court Act §115 (2001).

[14] *See* Interview with Barbara A. Babb, Associate Professor of Law, University of Baltimore School of Law, in Baltimore, MD (June 10, 2002).

[15] *See* Barbara A. Babb and Judith D. Moran, *Substance Abuse, Families and the Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & Pol'y 1, 18 (1999).

neglected or abused child. "During certain periods in this century, emphasis has been placed on family integrity and the inviolability of parents' fundamental rights to the child in all but the most extreme circumstances of maltreatment. However, in other periods considerations of the child's best interest have been used to justify high levels of state intervention in the parent-child relationship, including removal of the child and placement in foster care."[16]

Currently, the trajectory of public policy has veered toward more state intervention in the lives of children and families. Permanency for children, the clarion call of the late 1990's, continues into the new century, resulting in less judicial discretion as to when to terminate parental rights and to free a child for adoption.[17]

Prior to the passage of the Adoption and Safe Families Act of 1997, the law[18] guiding family court judges in cases of child abuse and neglect, although premised on permanency for children, allowed for considerable judicial discretion in determining when to permanently remove a child from her family. "Permanency planning meant that the state would make reasonable efforts to avoid the removal of children from their parents through service plans, would closely monitor children in placement, and work to reunite parents and children through supportive services if placement occurred."[19] This allowed judges to make more independent decisions about when to terminate parental rights.

The Adoption and Safe Families Act of 1997[20] heralded an era "of shorter and more stringent time requirements before actions would be taken to place children in permanent homes through adoption."[21] The 1997 law curtailed judges by imposing strict timelines on foster placement, as policymakers reacted to what they believed was an over-reliance on preservation and reunification efforts.[22] Thus, the family court judge was divested of discretion to determine when parents must demonstrate they are fit to retain or regain custody of their child or permanently lose their parental rights.

Cultural norms, as they relate to child rearing, also affect the adjudication of child abuse and neglect cases and circumscribe judicial

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[16] *See* Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L. Q. 359 (2000).

[17] *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89.

[18] *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272.

[19] *See* Kelly, *supra* note 16, at 364.

[20] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89.

[21] *See* Kelly, *supra* note 16, at 364.

[22] *See id.*

independence. Although state statutes ideally objectify parenting standards reflective of social norms, these laws can and do clash with child rearing practices in minority cultures.[23] A judge, although aware of the clash of cultural norms, may be forced to rule that certain behavior constitutes child neglect, dismissing evidence that a parent's particular ethnic orientation has influenced his behavior.

Child Custody

As there have been dramatic policy shifts in child welfare, there have been varying perspectives on child custody, as well. A review of the case law demonstrates the ebb and flow of judicial decision-making in this area of family law. The earliest cases devoted to custody decisions demonstrate a paternal preference.[24] By the late nineteenth century,[25] the cases reflect judicial reliance on the "tender years presumption," supporting routine custody awards to mothers of young children, as well as an inclination toward a maternal preference, regardless of the child's age.[26] At the 20th century's mid-point, history notes that courts craft decisions allowing for custody awards to the "psychological parent," yielding to social science research demonstrating the value of a child residing with the parent with whom the child has the strongest emotional bond. Concurrently, the "best interests" standard, which continues to guide judges in custody decision-making, also has been favored.

Although the "best interests" of the child is the overarching principle for custody decisions,[27] "[t]oo often, gender stereotypes play a role in custody determinations."[28] With the advent of the father's rights movement in the 1970s, yet another perspective on which parent is the preferable custodian has become part of the child custody debate. Owing to the substantial political activism stemming from the father's rights movement,[29] the political ramifications of a custody award, rather than the "best interests" of the child, may influence judges faced with a custody dispute.

Juvenile Delinquency

With the advent of the crime control agenda, which has gained momentum over the last several decades, many state legislatures have

[23] *See* Yilu Zhao, *Cultural Divide Over Parental Discipline*, N.Y. TIMES, May 29, 2002, at B3.

[24] *See* Shannon Dean Sexton, *A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 765 (1999-2000) (noting that under English common law the father was the preferred custodian and that this perspective permeated colonial American jurisprudence).

[25] *See id.* at 768.

[26] *See id.*

[27] *See id.* at 771.

[28] *See id.* at 762.

[29] *See id.* at 770 (describing the movement to influence state and federal legislators to retool custody laws so that they are more favorable to fathers).

responded by enacting laws to impose stiffer punishments on youthful offenders. Howard N. Snyder and Melissa Sickmund state in their report on juvenile offenders that "[p]erceptions of the juvenile crime epidemic in the early 1990's fueled public scrutiny of the system's ability to effectively control violent juvenile offenders. As a result, states have adopted numerous legislative changes in an effort to crack down on juvenile crime."[30]

The sweep of changes in juvenile crime legislation between 1992 and 1997 encompassed nearly every state in the country.[31] These revisions to existing statutes resulted in the following: making it easier to prosecute juveniles in adult criminal courts, expanding sentencing alternatives, decreasing restrictions on the confidentiality of juvenile proceedings, increasing the role of victims, and modifying correctional programs.[32]

The manner in which the courts handle juvenile offenders is based on two approaches, both of which involve judicial discretion. In each instance, the issue is whether the juvenile is tried in an adult court and, if so, how that occurs. Two states, Tennessee and New York, are illustrative of the differences. In New York,[33] the crime committed and the age of the child are automatic determinants of where the youth is tried. For example, commission of murder in the second degree at age thirteen compels a trial in an adult criminal court. The statute does, however, provide for transfer to juvenile court if "the court determines that to do so would be in the interests of justice."[34] The statute lists factors for the court to consider, but, clearly, judicial discretion is operative in this circumstance. Judges in Tennessee also are called upon to use discretion in determining whether a juvenile offender is tried in an adult criminal court. In a departure from New York law, judges in Tennessee have the discretion to transfer the case to the adult criminal court after a hearing on the issue.[35]

Notwithstanding the different mechanisms for applying adult criminal justice procedures to juvenile causes, judges are likely to be held accountable by the community for the kind of justice—juvenile or adultt—to which the youthful offender is subject. Because the focus of juvenile courts is rehabilitation and not punishment, allowing a juve-

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[30] *See* Howard N. Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 1999 National Report*, NATIONAL CENTER FOR JUVENILE JUSTICE, September 1999 at 85.

[31] *See id.* at 89 (noting that all but three states changed at least one aspect of the laws governing the adjudication of juvenile criminal offenders).

[32] *See id.*

[33] *See* NY CLS CPL § 1.20, § 210.43 2. (a)-(i) (2002).

[34] *See* NY CLS CPL § 210.43 1.(b) (2002).

[35] *See* TENN. CODE ANN. § 37-1-134. (2) (3) (4) (2001).

nile offender to remain in the juvenile system or returning her to it could cast the judge in a "soft on crime" light. Arguably, given society's crime control agenda, judges resist being independent decision-makers in this circumstance.

Marital Dissolution

Some of the most difficult decisions judges make in family law cases are those relating to the legal severance of the marital relationship. The difficulties arise from the fact that marital dissolution, particularly when children are involved, presents a plethora of issues. The legal outcomes have substantial long-term consequences, such as how and by whom the children are cared for, the economic well-being of a financially dependent spouse, and the fate of extended family relationships with children when grandparents and other relatives wish to maintain contact with them.

The granting of the divorce itself, despite any of the aforementioned issues, is fraught with our national ambivalence about the sanctity of the marital bond. The most notable examples are the recent state statutes providing for "covenant marriage," where those contemplating marriage enter into agreements that make a divorce more difficult to obtain.[36] In Louisiana, for example, the covenant marriage law limits the dissolution of the marital relationship to circumstances involving mostly fault-based grounds.[37]

Although covenant marriage as a legislative phenomenon is a rarity, many state statutes governing marital dissolution reflect our conflicted attitudes about divorce. The fault grounds enumerated in these laws provide insight into the national psyche surrounding the relationship that "no man shall put asunder." An examination of fault grounds for divorce actions across several states reflects our collective wisdom—that only the most egregious acts or the most difficult of circumstances substantiate dissolving the marital relationship. In Maine, for example, the grounds for divorce include: "adultery; impotence; extreme cruelty; utter desertion continued for three consecutive years prior to the commencement of the action; and gross and confirmed habits of intoxication from the use of liquor or drugs."[38] Even when irreconcilable differences exist, Maine provides for judicial discretion to order the couples to counseling.[39] It appears

[36] *See* ARIZ. REV. STAT. ANN. § 25-901 (2001), ARK. CODE ANN. § 9-11-202 MICHIE (2001), LA. REV. STAT. ANN. § 9:273 (WEST 2001).

[37] *See* LA. REV. STAT. ANN. 9:237(C) (WEST 2001).

[38] *See* MAINE, 19-A M.R.S. § 902 1 A-E (2001).

[39] *See* MAINE, 19-AM.R.S. § 902 2 (2001): Irreconcilable Differences; Counseling. "If one party alleges that there are irreconcilable marital differences and the opposing party denies that allegation, the court upon its own motion or upon motion of either party may continue the case and require both

that Maine favors reasonable efforts to preserve the marriage, or at least a demonstration, with objective evidence that the marriage cannot be saved.[40]

Maryland reveals that its public policy supports maintaining marital relationships by requiring the court's due diligence as to evidentiary findings. Maryland's evidentiary requirements for substantiating a divorce action include similar grounds as those numerated in the Maine statute, with the additional stricture of a corroborating witness to testify as to the grounds[41] and a showing that "there is no reasonable expectation of reconciliation."[42]
"The prevailing wisdom on divorce . . . has, like other cultural attitudes, changed along with the times."[43] It is, however, difficult to gauge these shifting winds of change—whether they are favorable to divorce, as evidenced by no fault laws, or whether our values support making divorces more difficult to obtain. With a backdrop of fault-based grounds for divorce in many states,[44] judges base their decisions on laws with insidious moral underpinnings. The wiggle room in many statutes with fault-based grounds, such as what constitutes "cruelty of treatment,"[45] gives judges discretion in decision-making both as to the form and substance of the divorce action. As noted above, in Maine a judge may compel the parties to attend marriage counseling. The decision to grant a divorce, or at least how to order the parties to proceed in obtaining one, is undoubtedly influenced by community norms. But divining those norms is difficult—judges who are too quick to grant a divorce may suffer reprisals from constituents whose moral compass veers in the direction of preserving the marital union, while judges who resist granting a divorce may be judged harshly, as well. In such a climate of uncertainty, it is not unreasonable to conclude that independent judicial decision-making is threatened by moral and social forces..

Family Violence

Violence between spouses, or other domestic partners, accounts for a substantial caseload in most family courts. These cases present judges with immediate safety issues for women and children. The result of seeking a protective order can place the vulnerable party in danger no matter what the legal outcome. There have been many cases where the

[40] *See id.* "The counselor shall give a written report of the counseling to the court and to both parties. The failure or refusal of the party who denies irreconcilable difference to submit to counseling without good reason is prima facie evidence that the marital differences are irreconcilable."

[41] *See* MD. FAMILY LAW CODE ANN. § 7-101 (1999).

[42] *See* MD. FAMILY LAW CODE ANN. § 7-103 (1999).

[43] *See* Daphne Merkin, *Can this Divorce Be Saved?*, THE NEW YORKER, April 22, 2002, at 192.

[44] *See* CODE OF ALA. § 30-2-1. (2001); NY CLS DOM. REL. § 170 (2002); VA. CODE ANN. § 20-91 (2001); NORTH CAROLINA § 50-5.1.

[45] *See* MD. FAMILY LAW CODE ANN. § 7-103 (7) (1999).

petitioner is killed leaving the courthouse after obtaining a protection order. Conversely, women whose petitions have been denied have suffered at the hands of their abusers. These high-stakes outcomes are fodder for the media to cast a bright light on judicial decision-making in family matters. It is not surprising that judges themselves may feel besieged, as they are second-guessed about the wisdom of their decisions in these most difficult cases. Furthermore, there is anecdotal evidence from domestic violence advocates that political influences taint the judiciary regarding these matters. This appears to be true, particularly in small rural jurisdictions, where a judge's relationships in the community may impact whether to grant an order that will shed an unfavorable light on a family's private affairs.

III. Other Influences

Media Pressures

A judge's worst nightmare may be to read that a youth she sentenced to probation committed a subsequent crime, or that a woman whose petition for an order of protection she denied was further harmed by her alleged batterer. The pressures of community norms and values are brought to bear in a more dramatic way when the news media reports the adverse consequences of a judicial decision. Although there may be no objective measurement to determine the effect of publicity, the independence of the judiciary clearly is compromised by media attention.

In addition to family court decisions that spawn subsequent violent criminal acts, other family court matters are also grist for the media mill. High-profile divorce cases make good copy, and they frequently contain specific judicial decisions, such as custody awards, child support mandates, and findings of fault.[46] As the wisdom of these decisions often is debated in the public arena, the potential for this public controversy to influence a judge is very real, indeed.

Changing Expectations of Judicial Roles

With the advent of a problem-solving approach to judicial decision-making,[47] spawned by the growth of specialized courts such as drug

[46] *See* Susan Saulny, *18 Months After Giuliani, Hanover Files for Divorce, Citing Adultery*, N.Y. TIMES, June 21, 2002, at B 3 (describing the specifics of the judge's decision regarding child support and spousal maintenance).

[47] *See* National Conference of State Court Administrators, Resolution 4, Conference of Chief Justices, Resolution 22, *In Support of Problem-Solving Courts*, Conference of Chief Justices, *at* http://cosca.ncsc.dni.us/resolutionproblemsolvingcts.html (resolving to spearhead the problem-solving model for judicial decision-making).

courts,[48] community courts,[49] and mental health courts,[50] a judge's role has changed dramatically. Criminal court judges presiding in drug courts may find themselves imposing sentences fashioned to rehabilitate a drug involved felon and monitoring his treatment regime. The expectations for family court judges, particularly those involved with child protection matters, often include a quasi-social work function. The judge is responsible to ensure that the family receives services, with the hope of keeping children in the home or facilitating their swift return to the family unit.

There is burgeoning evidence that society's expectations of the judiciary have taken on another dimension. A recent news article devoted to the issue of an Arizona judge's marijuana use during the period of time within which he imposed two death sentences highlights the extent to which a judge's private life should be in the public domain.[51] The federal appellate court challenge to one of the sentences has resulted in the court's upholding the defendant's death penalty appeal. Commenting upon the intrusive aspects of the decision, Judge Alex Kozinski has noted in his dissenting opinion that "the decision invited intrusion into judges' personal lives."[52] Echoing the concerns of the dissent, an Arizona Assistant Attorney General has opined that the decision could support inquiries about "all sorts of matters that might influence judicial decision making," including divorce.[53]

If the foregoing case promotes a trend toward the exploration of a criminal court judge's personal background, then the independence of the family court bench also may be at risk. Family law matters relate to issues affecting a significant percentage of the population. Professor Babb notes that family law cases account for more than 35% of the civil case filings in the nation's state courts.[54] In light of the high volume of this category of cases, it is likely that many family court judges, and/or their family members, have themselves been involved in a family court case. Consider the divorced judge presiding in a marital dissolution case. Will her decision be subject to challenge based upon that aspect of her personal history? Further, con-

[48] *See* Honorable Peggy Fulton Hora, Honorable William Schma and John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

[49] *See* Michele Sviridoff, David Rottman, Brian Ostrum and Richard Curtis, *Dispensing Justice Locally, The Implementation and Effects of the Midtown Community Court*, HARWOOD ACADEMIC PUBLISHERS, (2000).

[50] *See* Leroy L. Kondo, *Therapeutic Jurisprudence, Issues Analysis and Applications: Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Jurisprudence for Mentally Ill Offenders*, 24 SEATTLE L. REV. 373 (2000).

[51] *See* Adam Liptak, *Judge's Drug Use at Issue in 2 Death Sentences*, N.Y. TIMES, May 16, 2002, at A1.

[52] *See id.*

[53] *See id.* at A1, A22.

[54] *See* Barbara A. Babb, *Fashioning An Interdisciplinary Framework for Court Reform in Family Law: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

sider the presiding judge in a delinquency case, whose own child has been involved with the juvenile justice system. Does that fact preclude him from being impartial, thereby exposing the decision to appellate review? Holding judges accountable is a hallmark of our judicial system; however, in the quest for accountability, we may jeopardize judicial independence in the family courts of this country.

Judicial Discretion

The crux of the entire judicial independence dilemma may be society's increasing reluctance to allow for judicial discretion in family law decision-making. Professor John J. Sampson comments that the "establishment of basic family law policies by our elected representatives is preferable to leaving those decisions to lawyers, especially gubernatorially appointed lawyers."[55] He argues that "even when judges are elected, judicial elections virtually never turn on real policy issues, to say nothing of family law policies."[56] In discussing the evolution of Texas' joint custody statute, Professor Sampson notes the legislative trend to enact detailed custody directives.[57] He predicts a legislative trend toward reducing judicial discretion in family law matters.[58]

Although Professor Sampson speaks from his experience in one state, the issue he raises regarding who should decide what is best for families resonates with much of the previous discussion of the factors influencing judicial decision-making. With all the private and complicated matters involved in family law cases, it is not unreasonable to assume that few of us want a judge to decide them. If the judge is authorized to do so, we hold her accountable in ways that constrain her independence, whether through detailed legislative directives, media publicity, or the power of appointment or election.

IV. Conclusion

The resolution of the issue of judicial independence in the family court context involves addressing an array of factors that influence a judge's decision-making. To be sure, the appointment-election conundrum is one important concern; however, its resolution is not dispositive of the issue. As discussed earlier, under either selection process, family court judges are not free of political concerns, whether they are related to an appointment made by a public official or the result of election by their local constituents. Furthermore, the

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[55] *See* John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 FAM. L. Q. 565 (1999).

[56] *See id.*

[57] *See id.* at 580 *See also* Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine*, 33 FAM. L. Q. 543 (1999).

[58] *See* Sampson, *supra* note 55.

volatility of family law matters stems from the fact that these issues lie at the heart of what we hold most dear, our privacy, our homes, our spouses or partners, and our children. The beliefs that accompany the issues are closely held, as well, resulting from our own experience with a family and our reluctance to allow a third party to decide such private matters.

The context for family law decision-making, thus, is vulnerable to scrutiny of the judges' decisions, whether they involve which parent is awarded the custody of a child, how the courts handle a juvenile delinquent, or whether a marriage is dissolved. This public scrutiny constrains the actual independence of the family court judge because family law decisions frequently are subject to collective second-guessing.
The solution proposed to this problem is a relatively simple one, but it requires a concerted commitment to change the procedures for placing judges in family court and providing support for them while they are there.

First, family court judges should be scrutinized aggressively *before* they become judges. A rigorous standard for judicial selection can be implemented, "regardless of whether a given state is an elective state or an appointive state."[59] Most states require that family court judges have backgrounds that are particularly suited to family law.[60] This directive should be taken seriously, as it impacts the capacity of a judge to make the critical decisions involved in family law adjudication. It also would further the interests of "professionalizing the judiciary," with the hope of convincing the public that "judges ought to be selected differently than public officials in the political branches."[61] Arguably, if the public has confidence in the wisdom of judges, the conflict about judicial discretion[62] in making family law related decisions would be reduced.

Second, family court structures and procedures should be optimized to promote independent judicial decision-making. Professor Babb suggests that family court reform initiatives promote more informed and more independent thinking judges.

Finally, sitting judges should receive regular and on-going education and training in such subjects as family dynamics, domestic violence,

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[59] *See* E. Norman Veasey, *The Many Facets of the Judicial Independence Diamond*, 20 QUINNIPIAC L. REV. 779, 787 (2000).

[60] *See* MD. CTS. & JUD. PROC. §3-806 (2002 Replacement Volume).

[61] *See* Geyh, *supra* note 1, at 33.

[62] *See* Sampson, *supra* note 55.

and child development in order to promote more public confidence in the courts. This, in turn, facilitates the public's willingness to allow judges to judge—unhampered by political second guessing and personal bias.